

**FEDERAL ELECTION COMMISSION**  
999 E Street, N.W.  
Washington, D.C. 20463

**FIRST GENERAL COUNSEL'S REPORT**

MUR 5604

DATE COMPLAINT FILED: November 2, 2004

DATE OF NOTIFICATION: November 9, 2004

LAST RESPONSE RECEIVED:

December 29, 2004

DATE ACTIVATED: October 13, 2005

EXPIRATION OF STATUTE OF LIMITATIONS:

November 1, 2009

COMPLAINANT:

Charles R. Spies

RESPONDENTS:

William D. Mason

Friends of William D. Mason and Thomas Regas, in  
his official capacity as treasurer

Kerry-Edwards 2004, Inc. and Robert Farmer, in his  
official capacity as treasurer

RELEVANT STATUTES  
AND REGULATIONS:

2 U.S.C. § 431(4)

2 U.S.C. § 431(8)(B)(x)

2 U.S.C. § 431(20)(A)(iii)

2 U.S.C. § 431(22)

2 U.S.C. § 441(i)(f)

2 U.S.C. § 441d

26 U.S.C. § 9001 *et. seq.*

11 C.F.R. § 100.22

11 C.F.R. § 100.88

11 C.F.R. § 100.148

11 C.F.R. § 109.21

11 C.F.R. § 110.11

INTERNAL REPORTS CHECKED:

None

FEDERAL AGENCIES CHECKED:

None

**I. INTRODUCTION**

This matter centers on a handbill disseminated by the re-election campaign of William D. Mason, County Prosecutor of Cuyahoga County, Ohio, in support of Mason's re-election as County Prosecutor and of John Kerry's election as President. The complaint alleges that at least half the cost of the handbill was an in-kind contribution from Mason's non-federal committee, Friends of William D. Mason and Thomas Regas, in his official capacity as treasurer ("the Mason Committee"), to the publicly funded Kerry-Edwards 2004 campaign committee, in violation of the presidential public financing laws. It also alleges that the Federal share of the handbill's costs exceeded \$1,000, and that by making an "expenditure" in excess of that amount the Mason committee became a Federal political committee that should have registered with and reported to the Commission. Finally, the complaint alleges that the disclaimer on the communication is inadequate because it is not contained in a printed box and fails to state whether the communication was coordinated with and authorized by the Kerry campaign.

As discussed in more detail below, this Office concludes that the Mason Committee handbill was exempt from the definitions of "contribution" and "expenditure" because it was delivered only by hand. Therefore, the share of its costs attributable to Kerry was not an in-kind contribution to the Kerry campaign, nor did it trigger the registration and reporting requirements of the Federal Election Campaign Act of 1971, as amended (the "Act"). We also conclude, however, that the handbill constituted a "public communication" that qualified as "Federal election activity" subject to the limitations, prohibitions, and reporting requirements of the Act, which it did not meet. Further, the literature in question expressly advocated the election of John Kerry, and required, but lacked, a disclaimer compliant with the Commission's regulations.

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1 Accordingly, we recommend that the Commission find reason to believe that the Mason  
2 Committee violated 2 U.S.C. §§ 441d(a)(3), 441d(c) and 441i(f)(1).

3 **II. FACTUAL AND LEGAL ANALYSIS**

4 **A. Factual Background**

5 Prior to the November 2, 2004 general election, the Mason Committee produced and  
6 disseminated a one-page piece of campaign literature that featured both Mason and John Kerry.  
7 Attachment 1. The left side of the page leads with the declaration “Prosecutor **BILL MASON**  
8 is keeping us **safe**” (emphasis in original) and includes a picture of Mason. Surrounding the  
9 picture of Mason are phrases and narratives that support the “keeping us safe” declaration.  
10 Below them is a disclaimer that reads “Paid for by Friends of William D. Mason, Thomas  
11 Regas, Treasurer” that includes an address and a website. It is not contained in a printed box.

12 The right side of the page is headlined “**BILL MASON and JOHN KERRY fighting**  
13 **crime together.**” (Emphasis in original). Below this headline is a narrative beginning with “Bill  
14 Mason and John Kerry both have served as Prosecuting Attorneys,” followed by a description of  
15 Kerry’s accomplishments in that role:

16 As a prosecutor for one of America’s largest counties, John Kerry  
17 prosecuted Murderers, rapists and mob bosses. As an assistant District  
18 Attorney, he transformed one of the largest and most active District  
19 Attorney’s Offices in the nation into an efficient crime-fighting organization.  
20 He started a white-collar crime unit, a program for fast-tracking violent  
21 crimes to trial, and a victim’s rights unit that was the first of its kind in  
22 Massachusetts and one of the first in the nation.

23  
24 Below the narrative, the communication states: “**As president, John Kerry will: End The Cop**  
25 **Crunch**—Putting more officers on our streets and in our communities [;] **Keep Drugs Out of**  
26 **Our Communities**—Targeting drug traffickers and funding expanded drug abuse treatment  
27 programs[; and] **Reduce Gang Violence**—Send a message of zero tolerance for gang violence

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1 and help youth get on the right track.” (emphasis in original). At the bottom, there is a picture of  
2 Kerry, surrounded by a crowd holding signs saying “A Stronger America,” a slogan associated  
3 with the Kerry-Edwards campaign.

4 **B. Analysis**

5 **1. Respondents did not violate the presidential public financing laws and the**  
6 **Mason Committee was not required to register with or report to the**  
7 **Commission in connection with the communication**  
8

9 The Act and Commission regulations specifically exempt from the definitions of  
10 “contribution” and “expenditure” the payment by a local candidate or by such candidate’s  
11 authorized committee, of the costs of that candidate’s campaign materials that refer to a Federal  
12 candidate and that are used in connection with volunteer activities, including handbills, provided  
13 that the costs allocable to Federal candidates are made from contributions subject to the  
14 limitations and prohibitions of the Act. 2 U.S.C. § 431(8)(B)(x); 11 C.F.R. §§ 100.88 and  
15 100.148. This provision has been referred to as the “coattails exemption.”

16 In its response, the Mason Committee states that the campaign literature in issue “was not  
17 mailed to any voters” and “was distributed only by hand.” Mason Committee Resp. at 1. *See*  
18 *also* Varner Affidavit at ¶¶ 2 and 3 (attached to the Mason Committee’s response). Thus, it  
19 appears the communication was a “handbill.” *See The American Heritage Dictionary of the*  
20 *English Language*, Fourth Edition (2000) (defining “handbill” as a “printed sheet or pamphlet  
21 distributed by hand”). Given that handbills are specifically identified in the Act and the  
22 Commission’s regulations as included in the “coattails exemption,” it appears that the  
23 communication would not be an “expenditure” if the cost of the part allocable to Kerry was paid  
24 from Federally permissible funds.

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1 The only cost associated with the handbill provided by the Mason Committee was a \$450  
2 consulting fee paid to its vendor, Tactical Edge, for “the design of the campaign literature.”  
3 Mason Respondents Resp. at 1; Varner Affidavit at ¶ 1. However, even assuming the printing  
4 and any other costs were substantially higher, it appears that the Mason Committee had more  
5 than adequate Federally permissible funds to cover the portion allocable to Kerry.<sup>1</sup>

6 The Mason Committee’s state disclosure report for the relevant time period disclosed a  
7 cash-on-hand balance of \$352,382. The report reveals no corporate or labor organization  
8 contributions, and identifies only three individual contributions—each reportedly made months  
9 before the handbill was disseminated—that would exceed the Act’s contribution limitations,  
10 consisting of two \$2,500 contributions and one \$5,000 contribution.<sup>2</sup> Thus, while the total costs  
11 of producing the handbill are not known, it appears that the Mason Committee had sufficient  
12 FECA-compliant funds to cover the costs allocable to the Kerry portion. Therefore, the handbill  
13 falls within the “the coattail exemption.”

14 Because the costs of the handbill were exempt from the definitions of “contribution” and  
15 “expenditure,” the Mason Committee did not make, and the Kerry campaign did not accept, a  
16 contribution in violation of the presidential public financing laws. Moreover, the costs do not  
17 count toward the political committee threshold, and the Mason Committee accordingly was not  
18 required to register and report with the Commission based on its financing of the  
19 communication. *See* 2 U.S.C. § 431(4)(A). Therefore, we recommend that the Commission find

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<sup>1</sup> The Mason Committee’s state disclosure reports show a universe of printing costs in the applicable time period of \$66,743.19. Therefore, the highest amount of printing costs that could be attributable to the Kerry portion of the handbill was half that amount, or approximately \$33,372 (rounded).

<sup>2</sup> The Ohio Revised Code allows individuals to make contributions to statewide candidates in the amount of \$10,000 *See* OH R.C. § 3517.102(B)(1)(a)(i). The Cuyahoga County Board of Elections has confirmed that County Prosecutors can permissibly receive contributions from individuals at the same \$10,000 limit as statewide candidates

no reason to believe that William D. Mason and Friends of William D. Mason and Thomas Regas, in his official capacity as treasurer, violated 26 U.S.C. § 9001 *et. seq.* or 2 U.S.C. §§ 433 and 434. We also recommend that that the Commission find no reason to believe that Kerry-Edwards 2004, Inc. and Robert Farmer, in his official capacity as treasurer, violated 26 U.S.C. § 9001 *et. seq.*, and close the file as to them.

## 2. The handbill is a public communication

Despite its status as exempt from the definition of “contribution” or “expenditure,” it appears that the handbill is nonetheless a “public communication.” The Act’s definition of “public communication” lists a number of types of media that are covered, and then includes “any other form of general public political advertising.” 2 U.S.C. § 431(22); 11 C.F.R. § 100.26. The Mason campaign literature, although disseminated by hand, appears to fall into this category. The Explanation & Justification (“E&J”) for the Commission’s regulation defining “public communication,” 11 C.F.R. § 100.26, is silent as to whether handbills are included in the scope of that term. However, the E&J for a related provision adopted the same year—11 C.F.R. § 109.21(c)(4), one of the “content” standards for coordinated communications—specifically includes handbills as within the types of “public communication” that could be “publicly disseminated” and thus potentially subject to the rule. *E&J for Regulations on Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 429 (January 3, 2003) (“the term ‘publicly distributed’ refers to communications distributed by radio or television and the term ‘publicly disseminated’ refers to communications that are made public via other media, *e.g.*, newspaper, magazines, **handbills**”).<sup>3</sup> (Emphasis added). If a handbill were not a public communication, it

<sup>3</sup> The Commission has recently amended certain rules pertaining to coordinated communications. However, the changes to 11 C.F.R. § 109.21(c)(4) have no impact on this analysis. See *Coordinated Communications*, 71 Fed. Reg. 33190, 33197-9 (June 8, 2006).

1 would not have been subject to that particular regulation. The conclusion that the handbill is a  
2 “public communication” raises issues regarding Federal election activity and the soft money  
3 prohibitions, and we next turn to a discussion of those issues.

4 **3. The handbill violates the soft money prohibitions for local candidates**

5  
6 The Act prohibits a candidate for local office, individual holding local office, or an agent  
7 of such a candidate from spending any funds for a communication that meets the definition of  
8 “Federal election activity” unless the funds are subject to the Act’s limitations, prohibitions, and  
9 reporting requirements. 2 U.S.C. § 441i(f). *Compare* 2 U.S.C. § 431(8)(B)(x) (Federal funds  
10 limitation on “coattails exemption” satisfied if funds are within the Act’s limitations and  
11 prohibitions, with no mention of reporting requirements). “Federal election activity” means,  
12 *inter alia*, “a public communication that refers to a clearly identified candidate for Federal office  
13 (regardless of whether a candidate for . . . local office is also mentioned or identified) and that  
14 promotes or supports a candidate for that office,” regardless of whether the communication  
15 contains express advocacy. 2 U.S.C. § 431(20)(A)(iii). We shall discuss the Mason Committee  
16 handbill for purposes of express advocacy *infra* Section II.B.4.

17 Mason was both an incumbent and candidate for local office when his committee  
18 produced and disseminated the public communication that refers to Kerry, a clearly identified  
19 candidate for Federal office. The communication promotes and supports Kerry by describing his  
20 accomplishments as a prosecutor and favorably predicting what he would do to fight crime “as  
21 president.” It also contains a picture of Kerry surrounded by supporters holding his campaign  
22 signs. As the Mason Committee is not a “political committee” within the meaning of the Act,  
23 funds in its account used to pay for the communication, were, of course, not subject to the Act’s  
24 reporting requirements. Therefore, we recommend that the Commission find reason to believe

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1 that Friends of William D. Mason and Thomas Regas, in his official capacity as treasurer,  
2 violated 2 U.S.C. § 441i(f)(1) by funding the communication in issue. Because we do not know  
3 if the candidate had any involvement in the funding of the handbill, we recommend that the  
4 Commission take no action at this time regarding any possible violation of 2 U.S.C. § 441i(f)(1)  
5 by William D. Mason. If we find during our investigation that he had no such involvement, we  
6 will recommend that the Commission find no reason to believe he violated 2 U.S.C. § 441i(f)(1)  
7 at the appropriate time.

8 **4. The handbill violated the disclaimer requirements**

9 The complaint, after concluding that the Mason Committee was required to file as a  
10 political committee, alleges that the handbill does not meet the federal disclaimer requirements  
11 because “[s]ection 441d of the Act requires disclaimers on political public communications.”  
12 Complaint at 2. The Act recognizes that a disclaimer is required whenever: (1) a political  
13 committee makes a disbursement for the purpose of financing any communication through any  
14 broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other  
15 type of general public political advertising; (2) any person makes a disbursement for the purpose  
16 of financing express advocacy communications; (3) any person solicits any contributions; or (4)  
17 any person makes a disbursement for an electioneering communication. 2 U.S.C. § 441d(a). As  
18 discussed *supra*, the Mason Committee was not a political committee within the meaning of the  
19 Act. Therefore, it is not covered by the requirement that political committees comply with the  
20 disclaimer provision in section 441d when disbursing funds for political communications. *See*  
21 11 C.F.R. § 110.11(a)(1). Given that the handbill did not solicit for contributions or constitute an  
22 “electioneering communication,” *see* 2 U.S.C. § 441d(a); 11 C.F.R. § 110.11(a)(3)-(4), the  
23 remaining question is whether the handbill contains express advocacy. *See* 2 U.S.C. § 441d(a);

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1 11 C.F.R. § 110.11(a)(2). According to the Mason Respondents, the literature does not contain  
2 express advocacy because it “does not tell the reader for whom to vote or vote against.” Mason  
3 Respondents Response at 4.<sup>4</sup> We disagree.

4 Under the Commission’s regulations, a communication contains express advocacy when  
5 it uses phrases such as “vote for the President,” “Smith for Congress,” “or individual word(s),  
6 which in context can have no other reasonable meaning than to urge the election or defeat of one  
7 or more clearly identified candidate(s)...” See 11 C.F.R. § 100.22(a); *Buckley v. Valeo*, 424 U.S.  
8 1, 44 n.52 (1976); see also *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249  
9 (1986) (“*MCFL*”). The Commission’s regulations further define express advocacy as a  
10 communication containing an “electoral portion” that is “unmistakable, unambiguous, and  
11 suggestive of only one meaning” and about which “reasonable minds could not differ as to  
12 whether it encourages actions to elect or defeat” a candidate when taken as a whole and with  
13 limited reference to external events, such as the proximity to the election. 11 C.F.R. § 100.22(b).  
14 In its discussion of then-newly promulgated section 100.22, the Commission stated that  
15 “communications discussing or commenting on a candidate’s character, qualifications or  
16 accomplishments are considered express advocacy under section 100.22(b) if, in context, they  
17 have no other reasonable meaning than to encourage actions to elect or defeat the candidate in  
18 question.” *Explanation and Justification*, 60 Fed. Reg. 35291, 35295 (Jul. 6, 1995).

19 The Mason campaign literature, which was disseminated before the November 2, 2004  
20 general election, comments on Senator Kerry’s accomplishments, and explicitly links those  
21 accomplishments to his status as a candidate for President. Specifically, it notes that Kerry

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<sup>4</sup> The Mason Respondents state that the literature “was designed solely to promote” Mason’s reelection bid as county prosecutor, and “was created to highlight Mr. Mason’s record and positions on law enforcement issues and draw a favorable comparison with that of former prosecutor John Kerry.” Mason Respondents Response at 2.

1 “transformed one of the largest and most active District Attorney’s Offices in the nation into an  
2 efficient crime-fighting organization” and started “a program for fast-tracking violent crimes to  
3 trial, and a victim’s rights unit that was the first of its kind in Massachusetts and one of the first  
4 in the nation.” Further, it links those positive statements with language projecting the crime-  
5 fighting activities he will perform “[a]s president” and with pictures of Kerry in a victory pose  
6 surrounded by a crowd holding Kerry campaign signs. In context, this public communication  
7 sends a message that is “unmistakable, unambiguous, and suggestive of only one meaning”: vote  
8 for Kerry for President and Mason for Prosecutor. Moreover, reasonable minds could not differ  
9 as to whether the Mason handbill encourages readers to vote for Kerry and Mason or encourages  
10 some other kind of action. Indeed, the Mason campaign literature does not direct the reader to  
11 take any other action. Therefore, the Mason campaign literature contains express advocacy  
12 under section 100.22(b).<sup>5</sup>

13 The Mason Committee’s public communication differs from the communication recently  
14 considered by the Commission in MUR 5468R (Moretz for Congress). The facts in MUR 5468R  
15 center on congressional candidate George Moretz’s criticism of John Kerry on a television  
16 advertisement.<sup>6</sup> Unlike the Mason handbill, the Moretz advertisement did not expressly advocate

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<sup>5</sup> Even if the Mason campaign literature contains what could be deemed some issue discussion, that would not mean it did not also contain express advocacy. In *MCFL*, the Supreme Court, in considering a newsletter that contained some discussion of issues, found that it could not “be regarded as a mere discussion of public issues that by their nature raises the names of certain politicians.” *MCFL* at 249. Rather, the newsletter went “beyond issue discussion to express advocacy.” *Id* Similarly, in the instant MUR, despite text relating to public safety and fighting crime, the Mason literature cannot “be regarded as a mere discussion of public issues that by their nature raises the names of certain politicians,” but instead crosses the line into express advocacy.

<sup>6</sup> The 30-second advertisement in MUR 5468R features images of John Kerry and a headline reading “Kerry attacks Bush.” It also contains the following text read by George Moretz. “Muslim terrorists declared war on America, but liberal Democrats act like the enemy is President Bush. [Clip of John Kerry saying: ‘Inept, reckless, profoundly dangerous, radically wrong.’] John Kerry is wrong The terrorists want to destroy us, and all that America stands for. This is a battle we must win. I’m George Moretz and I authorize this ad. [Voiceover: George Moretz, made in America].” The caption “George Moretz, Republican for Congress” and the disclaimer “Paid by George Moritz for Congress” appear at the end of the advertisement.

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1 the defeat of Kerry under section 100.22(b). The Moretz advertisement did not refer to the  
2 character, qualifications or accomplishments of either Bush or Kerry. It characterized Kerry's  
3 position on the issue of terrorism, stated that Moretz disagreed with the position as characterized,  
4 and offered, in text accompanying the audio, a way to "win the battle": voting for Moretz.  
5 Unlike in the present matter, Moretz was the only candidate whose election was expressly  
6 advocated in MUR 5468R.

7 Because the Mason Committee's public communication contains express advocacy, its  
8 disclaimer needed to include a statement clearly stating that it "is not authorized by any  
9 candidate or candidate's committee," and be contained in a printed box set apart from the  
10 remainder of the communication. *See* 2 U.S.C. § 441d(a)(3), (c)(2) and 11 C.F.R.  
11 § 110.11(b)(3), (c)(2)(ii). The disclaimer did not meet these requirements.

12 Accordingly, we recommend that the Commission find reason to believe that Friends of  
13 William D. Mason and Thomas Regas, in his official capacity as treasurer, violated 2 U.S.C.  
14 §§ 441d(a)(3) and 441d(c) by failing to include an adequate disclaimer.<sup>7</sup> Given that we have no  
15 evidence that the candidate himself was personally involved in the design or funding of the  
16 communication, we recommend that the Commission take no action at this time regarding any  
17 possible violation of 2 U.S.C. §§ 441d(a)(3) and 441d(c) by William D. Mason. If we find  
18 during our investigation that he had no such involvement, we will make the appropriate  
19 recommendations.

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<sup>7</sup> The complainant also alleged that the disclaimer failed to identify whether it was coordinated and authorized by the Kerry campaign. However, the complainant did not provide any evidence of coordination and the Mason Committee and the Kerry campaign both denied that the Kerry campaign had any involvement with the handbill or otherwise met the criteria for a "coordinated communication" as set forth in 11 C.F.R. § 109.21.

**III. PROPOSED DISCOVERY**


**IV. RECOMMENDATIONS**


1. Find reason to believe Friends of William D. Mason and Thomas Regas, in his official capacity as treasurer, violated 2 U.S.C. §§ 441d(a)(3) and 441d(c) and 441i(f)(1).
2. Take no action at this time regarding William D. Mason with respect to possible violations of 2 U.S.C. §§ 441d(a)(3) and 441d(c) and 441i(f)(1).
3. Find no reason to believe William D. Mason and Friends of William D. Mason and Thomas Regas, in his official capacity as treasurer, violated 2 U.S.C. §§ 433, 434, 441d and 26 U.S.C. § 9001 *et. seq.*
4. Find no reason to believe that Kerry-Edwards 2004, Inc. and Robert Farmer, in his official capacity as treasurer, violated 26 U.S.C. § 9001 *et. seq.* in this matter, and close the file as to them.
5. Approve the attached Factual and Legal Analysis.
- 6.


7. Approve the appropriate letters.

Lawrence H. Norton  
General Counsel

8/30/06  
Date

BY:   
Lawrence L. Calvert, Jr.  
Deputy Associate General Counsel  
for Enforcement

  
Susan L. Lebeaux  
Assistant General Counsel

  
Roy Q. Luckett  
Attorney

Attachments:

1. Friends of William D. Mason handbill
2. Factual and Legal Analysis